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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 327

HOBSON P. JONES,
Appellant-Petitioner

v.

THE STATE OF MISSISSIPPI,
Appellee-Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FORREST B. JACKSON,
Attorney.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No.

HOBSON P. JONES,
Appellant-Petitioner

v.

THE STATE OF MISSISSIPPI,
Appellee-Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Your Petitioner, Hobson P. Jones, respectfully petitions this Honorable Court for writ of certiorari to the Supreme Court of the State of Mississippi in this cause.

Statement of Constitutional Question Involved

This case involves the right of a citizen of the United States to a fair and impartial trial in the state court guaranteed to him under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

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The Petitioner was tried in the Circuit Court of the First Judicial District of Hinds County, Mississippi, upon a charge of larceny and during the course of the trial, the District Attorney at and during the argument of the cause and in the concluding argument made the following statement:

> "I don't know if Jones works or not but con men don't usually work. Mr. Jones and his co-horts are con men. Mr. Jones can con intelligent men too, but he doesn't use this scheme on them, he uses other tricks. He picks his games according to the individual. He uses this trick on ignorant negroes. I don't know how many other people he had conned, or how many more he will con, and I just hope he doesn't con you!"

Thereupon, the Trial Judge took the following action:

> "Yes, I sustain the objection. You cannot even generally refer to anything even indicating that *any crime had been done in the past*, if that could be implied from what he said, and you gentlemen will disregard what the District Attorney has said with reference that might indicate in any sense *any other crime having been committed in the past.*" (Emphasis ours).

The Supreme Court in its original opinion of April 11, 1955, held as follows:

> "The appellant further complains of the action of the trial court in refusing to grant his motion for a mistrial because of claimed improper remarks of the district attorney in his argument to the jury. Objection to the remarks was promptly made by the appellant and sustained by the court, and the jury instructed to disregard the same. A special bill of exceptions was

granted to the appellant setting forth the remarks of the district attorney and the court's ruling thereon. It is complained, however, that the court's remarks in sustaining the objection emphasized the prejudicial effect of the district attorney's argument. We deem is unnecessary to set out the remarks of the district attorney or of the court in ruling on the objection thereto. While we are of the opinion that the remarks of the district attorney were objectionable, we are further of the opinion that the court's remarks in sustaining the objection were not subject to criticism, and that the incident does not constitute reversible error."

Copy of Entire Opinion is Appendix "A" hereto attached.

In the Suggestion of Error filed, copy of which is contained in the record being transmitted herein, the Petitioner urged that under the decisions of the Supreme Court of Mississippi in *Berry vs. State,* 212 Miss. 164, 54 So. 2d 222, the Supreme Court of Mississippi had already held as a matter of law that the mere admonition of counsel and a statement of the Trial Judge that the jury would know whether or not such facts were in evidence were not sufficient to cure the harmful effects of improper and prejudicial argument. Other decisions of the Supreme Court of Mississippi to the same effect are:

Hathaway vs. State, 195 Miss. 311, 15 So. 2d 361, Sustaining Suggestion of Error on 13 So. 2d 819.
Murray vs. State, (Miss.) 52 So. 2d 288.
Jackson vs. State, 94 Miss. 83, 47 So. 502.
Collins vs. State, 99 Miss. 52, 54 So. 666.
Floyd vs. State, 166 Miss. 15, 148 So. 226.
Seal vs. State, 169 Miss. 467, 153 So. 385.

The rule of law having therefore been established by the Supreme Court of the State of Mississippi, the Petitioner was entitled to have the same rule applied to his case so as to insure to him a fair and impartial trial devoid of any prejudice.

The rule relied upon is stated in *Lisenba vs. California,* 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed. 166; *Lyons vs. Oklahoma,* 322 U.S. 596, 88 L. Ed. 1481 and *Gallegos vs. Nebraska,* 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 86.

That rule is as follows:

> "The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of 'that fundamental fairness essential to the very concept of justice' and in a way that 'necessarily prevents a fair trial.' "

The Court Has Jurisdiction

You have jurisdiction to review under Title 28 U.S.C., Section 1257(2) and (3), or alternatively by certiorari under Title 28 U.S.C., Section 2103.

Jurisdiction is sought on the grounds of the Petitioner, Hobson P. Jones, being denied his constitutional rights as hereinabove set out and the Supreme Court of Mississippi has decided a constitutional question in direct conflict with Amendment Fourteen of the Constitution of the United States and has denied both the equal protection and due process clauses of said Amendment to this Petitioner.

This appeal is from a Final Judgment of the highest court in the State of Mississippi in which the decision could be had. The Suggestion of Error was overruled on the 16th day of May, 1955, and the application for review and appeal was granted by the Chief Justice of the Supreme Court of Mississippi on the 18th day of May, 1955. The appeal

to this Honorable Court was perfected by the posting of a cost and appearance bond with supersedeas approved by the Clerk of the Supreme Court of Mississippi on the 18th day of May, 1953.

There has been a final determination of the constitutional question by the highest court of the State of Mississippi and Petitioner has exhausted all his remedies in the State courts and he now, therefore, seeks to have the decision of the Supreme Court of Mississippi reviewed either on direct appeal or by writ of certiorari by this Honorable Court.

Copies of Judgments of Mississippi Supreme Court, Appendix "B" and "C" hereto.

Reasons Relied Upon for the Allowance of the Writ

A substantial constitutional question presents itself with respect to the right of the accused to have accorded to him the same rule of law that had been determined by the Supreme Court of the State of Mississippi on other appeals where the same question was presented and where, in the instant case, the decision was contrary to his contention although the Trial Court and the Appellate Court had held that the argument of the District Attorney was highly prejudicial and consituted error but not sufficient to reverse the cause.

Prayer

WHEREFORE, your Petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the Supreme Court of the State of Mississippi commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Supreme Court of Mississippi had in this case, numbered and entitled on its Docket, No. 39,640, Hobson P. Jones vs. The State of Mississippi, to the end that this cause may be

reviewed and determined by this Court and that the judgment of the said Supreme Court of Mississippi may be reserved by this Court and for such other relief as this Court may deem proper.

HOBSON P. JONES,
Appellant-Petitioner.
By FORREST B. JACKSON,
His Attorney.

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

No. 39,640

HOBSON P. JONES

vs.

STATE OF MISSISSIPPI

OPINION

HOLMES, Justice:

The appellant was indicted in the Circuit Court of the First Judicial District of Hinds County on a charge of grand larceny. The indictment charged that he did wilfully, unlawfully and feloniously take, steal and carry away $300.00 good and lawful money of the United States of America, of the value of $300.00, the property of L. C. Lipscomb. The appellant's trial resulted in his conviction and he was sentenced to a term of five years in the State penitentiary. From the judgment and sentence, he prosecutes this appeal.

The proof is undisputed. The appellant and Robert Conn, sometime in June, 1952, met Carl Matthews in Utica, Mississippi, and informed him that they had a scheme whereby they could make some money and that they were looking for prospects. They accompanied Matthews to Port Gibson, where Matthews introduced them to two Negroes, L. C. Lipscomb and his step-father, Jake Tarleton. There the appellant unfolded his scheme and exhibited a small pasteboard box, and demonstrated how the box might be so manipulated as to double or triple money. Lipscomb and Tarleton were induced to meet Matthews, Conn and the appellant in Utica the next morning, and they went to Utica pursuant to such appointment. When they got there

they were informed by Conn and Matthews that the appellant was in Jackson, and they were persuaded to come to Jackson for the purpose of meeting the appellant at the Robert E. Lee Hotel. Tarleton had $200.00 in money, and Lipscomb had $300.00. Conn, Matthews, Lipscomb and Tarleton came to Jackson in an automobile and stopped in front of, or by the side of, the Robert E. Lee Hotel. Conn went in the hotel to locate the appellant. In a little while, the appellant appeared and inquired of Tarleton and Lipscomb if they understood the deal, and they were then induced to pay the money to Jones, Tarleton paying him $200.00, and Lipscomb paying him $300.00. It was represented to them by the appellant Jones, according to the testimony of Lipscomb, which is undisputed, that the appellant wanted to get the serial numbers from the $300.00 which Lipscomb was induced to pay him, and that the same identical money, that is to say, the $300.00, would be returned to Lipscomb, plus three for one. Pursuant to this scheme, the $300.00 was paid by Lipscomb to the appellant, and Tarleton also paid the appellant $200.00. Matthews gave the appellant $200.00, which it later developed had been furnished to him by Conn in order to create the appearance that Matthews had faith in the scheme. The appellant, after getting the money, disappeared in the hotel, and when he did not return, the parties went to look for him, and they couldn't find him and did not again see him until they had reported the matter to the police, and they identified the appellant in a line-up at police headquarters in Jackson a day or two later.

The appellant contends that the proof is insufficient to convict him of the crime of grand larceny and that the trial court, therefore, erred in denying his request for a peremptory instruction. The basis of this contention is that the proof is consistent with an hypothesis that would establish either grand larceny or embezzlement or obtaining

money under false pretenses, and, therefore, as a matter of law, tends to establish neither of such charges, and hence is insufficient to establish the guilt of the appellant beyond every reasonable doubt. Even if it should be granted that appellant's argument is correct in theory, it is not maintainable in this case because not supported by the proof. Essential elements are lacking in the proof to establish the appellant's guilt of either the crime of embezzlement or the crime of obtaining money under false pretenses. Embezzlement is the wrongful appropriation or conversion of property where the original taking was lawful or with the consent of the owner. 29 C. J. S., Embezzlement, Sec. 4, p. 672; *Jackson* v. *State*, 211 Miss. 828, 52 So. 2d 914.

In the case at bar, the proof shows that the original taking was effected by fraud and was, therefore, unlawful. *Watson* v. *State*, 36 Miss. 593. In cases of false pretense, it is essential that the proof show that the owner in parting with the property invests the recipient with the title thereto as well as the possession thereof. *Courtney, et al.* v. *State*, 174 Miss. 147, 164 So. 227; *Fuller* v. *State*, 72 So. 2d 454. The undisputed proof in the case at bar shows that there was no intention on the part of Lipscomb to transfer to the appellant the title to the money which was delivered to the appellant. The money was delivered to the appellant in order that the appellant might take the serial numbers thereof, and with the express understanding that the identical money was to be returned to Lipscomb. Hence the proof in the case before us shows neither a lawful taking nor an intention on the part of Lipscomb to vest in the appellant the title to the money which was delivered to him, and, therefore, the proof fails to establish either the crime of embezzlement or obtaining money under false pretenses.

On the other hand, the undisputed proof shows that the appellant obtained possession of the money by fraudulent means and with the felonious intent to deprive the owner

thereof, and did in fact deprive the owner thereof, and thereby committed the crime of larceny. *Watson* v. *State*, *supra*.

Analogous to the case at bar is the case of *Ware* v. *State*, 186 Miss. 533, 191 So. 678. In that case, the defendant and others induced the complaining witness to part with $1500 for the purpose of changing it into bills of larger denomination by a chemical process, upon the promise to return the identical money used, together with a sum of money as a profit for its use, and upon receiving such money the defendant disappeared with it, in that case the Court held the defendant to be guilty of grand larceny.

Likewise analogous is the case of *Garvin* v. *State*, 207 Miss. 751, 43 So. 2d 209, wherein this Court held that the proof established the crime of grand larceny. Accordingly, we have no difficulty in holding that the undisputed evidence in this case establishes beyond all reasonable doubt appellant's guilt of grand larceny, effected by fraudulent means, and in our opinion, the trial judge was correct in denying the appellant's request for a peremptory instruction.

It is next contended by the appellant that the trial court erred in granting to the State its requested instruction No. 1. This instruction informed the jury of the elements necessary to constitute the crime of grand larceny. It is argued by the appellant that the instruction is erroneous because it does not state that the taking of the money must be with the felonious intent of depriving the actual owner of the actual money which was delivered to the appellant by Lipscomb. We do not think that the appellant's criticism of the instruction is well-founded. The instruction defines the crime of grand larceny in conformity with Section 2240 of the Mississippi Code of 1942, and, in our opinion, was properly granted.

The appellant further complains of the action of the trial court in refusing to grant his motion for a mistrial because of claimed improper remarks of the district attorney in his argument to the jury. Objection to the remarks was promptly made by the appellant and sustained by the court, and the jury instructed to disregard the same. A special bill of exceptions was granted to the appellant setting forth the remarks of the district attorney and the court's ruling thereon. It is complained, however, that the court's remarks in sustaining the objection emphasized the prejudicial effect of the district attorney's argument. We deem it unnecessary to set out the remarks of the district attorney or of the court in ruling on the objection thereto. While we are of the opinion that the remarks of the district attorney were objectionable, we are further of the opinion that the court's remarks in sustaining the objection were not subject to criticism, and that the incident does not constitute reversible error.

Finally, it is contended by the appellant that the trial judge committed prejudicial error in himself examining and questioning at length Ben Thompson, a witness called on behalf of the appellant. The witness indicated in his testimony that he had been furnished $150.00 at one time and $250.00 at another to be given to Lipscomb with the understanding that Lipscomb was to get out of the way and not be a witness at the trial. The trial judge questioned the witness at some length in the apparent effort to develop the facts with reference to his claim that he had been furnished money to give to Lipscomb to get out of the way. A careful reading of the trial judge's examination of the witness reveals that there was nothing in the manner or method thereof to indicate the trial judge's opinion of the value of the witness' testimony, or to indicate the judge's opinion of such testimony. While we do not sanction extended examination of a witness by the trial judge

in all cases, this court has recognized the right of the tria judge to examine a witness within limitations in order t clarify his testimony and to further develop the facts abou which he is testifying, so long as the judge does not indi cate his opinion of the value of such testimony or expres any opinion with reference thereto. *Breland* v. *State*, 18 Miss. 830, 178 So. 817.

In the case of *Griffin* v. *State*, 171 Miss. 70, 156 So. 652 the Court said: "The circuit judge has an undoubte right to interrogate witnesses in the interest and for th purpose of developing the truth of the matter at issue, an he likewise has a discretion to determine when a necessity or propriety therefore exists." We are of the opinio that the trial judge, in the case at bar, did not exceed th limitations within which he was authorized to examine th witness.

Viewing the record as a whole, it discloses undisputed proof of appellant's guilt of the crime of grand larceny effected by fraudulent means. The evidence reveals a ne farious scheme on the part of the appellant to prey upon credulous and unsuspecting persons, who, yielding to the temptation to acquire easy riches, became ready victims of appellant's perfidy. The appellant well deserved the pun ishment imposed upon him by the trial judge, and the judgment of conviction is affirmed.

Affirmed.

McGhee, C.J., and Lee, Arrington and Ethridge, JJ. Concur.

APPENDIX "B"

IN THE SUPREME COURT OF MISSISSIPPI

Monday, April 11th, 1955 Court Sitting

39,640

HOBSON P. JONES

vs.

STATE

This cause having been submitted at a former day of this term on the record herein from the Circuit Court of Hinds County and this court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the November 1953 Term a conviction of grand larceny and a sentence to serve a term of 5 years in the State Penitentiary —be and the same is hereby affirmed. It is further ordered and adjudged that the County of Hinds do pay the costs of this appeal to be taxed, etc.,

Minute Book "BK" Page 606.

APPENDIX "C"

IN THE SUPREME COURT OF MISSISSIPPI

Monday, May 16, 1955 Court Sitting

39,640

HOBSON P. JONES

vs.

STATE

This cause this day came on to be heard on the suggestion of error filed herein and this court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

Minute Book "BL" Page 8.

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FILED
AUG 15
HAROLD B. WILL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 327

HOBSON P. JONES,
Appellant-Petitioner,

v.

THE STATE OF MISSISSIPPI,
Appellee-Respondent

STATEMENT OF JURISDICTION AND OTHER MATTERS REQUIRED BY RULE 12

By FORREST B. JACKSON,
His Attorney.